

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STEVEN SCHREIBER, : 15-CV-6861 (CBA)
Plaintiff, : United States Courthouse
-against- : Brooklyn, New York
EMIL FRIEDMAN, ET AL., : March 8, 2016
Defendant. : 3:00 p.m.
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE CAROL BAGLEY AMON
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: NELKIN & NELKIN
5417 Chaucher Drive
Houston, Texas 77055

BY: JAY P. NELKIN, ESQ.
CAROL NELKIN, ESQ.

For the Defendants: HERRICK FEINSTEIN, LLP
Attorneys for Emil Friedman
and NY Best Coffee
2 Park Avenue
New York, New York 10016

BY: PAUL H. SCHAFHAUSER, ESQ.

1 APPEARANCES CONTINUED:

2
3 GARVEY SCHUBERT BARER
4 Attorneys for Solomon Birnbaum,
5 26 Flavors, Office Coffee Services
6 100 Wall Street
7 New York, New York 10005

8 BY: MAURICE W. HELLER, ESQ.

9
10 ROSENBERG FELDMAN SMITH, LLP
11 Attorneys for Michael Devine,
12 Michael Devine, CPA
13 551 Fifth Avenue
14 New York, New York 10176

15 BY: RICHARD B. FELDMAN, ESQ.

16
17 MAYNER & LANDIS, LLP
18 Attorneys for E & J Funding, E & I
19 Investors Group, E & Jeryg Management
20 One Gateway Center
21 Newark, New Jersey 07102

22 BY: DAVID B. GRANTZ, ESQ.

23
24 RICHARD A. FINKEL, ESQ. &
25 ASSOCIATES, PLLC
Attorneys for Sylvia Ezell, Sonia
Rivera, Jorge Salcedo,
270 Madison Avenue
New York, New York 10016

BY: RICHARD A. FINKEL, ESQ.

1 APPEARANCES CONTINUED:

2
3 ABRAMS GARFINKEL MARGOLIS BERGSON, LLP
4 Attorneys for Geoffrey Hersko,
5 Geoffrey S. Hersko, P.C.
6 1430 Broadway
7 New York, New York 10018

8 BY: ROBERT J. BERGSON, ESQ.

9 THOMPSON HINE, LLP
10 Attorneys for 165 Realty Corp., 24
11 Hour Oil Delivery, Associated Fuel
12 Oil, Light Trucking, MB Fuel Transport
13 1, MB Fuel Transport, Park Avenue
14 Associates
15 335 Madison Avenue
16 New York, New York 10017

17 BY: BRIAN D. WALLER, ESQ.

18
19 Court Reporter: LINDA A. MARINO, RPR
20 225 Cadman Plaza East
21 Brooklyn, NY 10021
22 (718) 613-2484

23 Proceedings recorded by mechanical stenography. Transcript
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25

1 THE CLERK: Schreiber, et al., versus Friedman, on
2 for oral argument.

3 THE COURT: Good afternoon. Will the parties state
4 their appearances, please?

5 First, for the plaintiff?

6 MR. NELKIN: Jay Nelkin, Nelkin & Nelkin, P.C., for
7 the plaintiff.

8 THE COURT: And for the defendant?

9 MR. SCHAFHAUSER: Good afternoon, your Honor. Paul
10 Schafhauser, Herrick Feinstein, for defendants Emil Friedman
11 and New York Best Coffee.

12 MR. GRANTZ: Good afternoon, your Honor. David B.
13 Grantz, G-R-A-N-T-Z, from the law firm of Mayner & Landis, on
14 behalf of E & J Funding Company, LLC; E & J Management, Inc; E
15 & Jeryg Management Corp, and E & I Investors Group, LLC.

16 THE COURT: David Grantz?

17 MR. GRANTZ: Grantz, G-R-A-N-T-Z.

18 MR. BERGSON: Good afternoon, your Honor. Rob
19 Bergson, Abrams Garfinkel Margolis Bergson, for defendant
20 Geoffrey Hersko.

21 THE COURT: I'm sorry, your name again? I have a
22 series of names here.

23 MR. BERGSON: Robert Bergson, B-E-R-G-S-O-N.

24 MR. FELDMAN: Richard Feldman, Rosenberg Feldman
25 Smith, for Michael Devine and Michael Devine, CPA.

1 THE COURT: Okay.

2 MR. FINKEL: Richard A. Finkel, your Honor, for
3 Sylvia Ezell, Sonia Rivera, and Jorge Salcedo.

4 THE COURT: Okay.

5 MR. HELLER: Good afternoon, your Honor. Maurice
6 Heller, Garvey Schubert Barer, for Solomon Birnbaum; Single
7 Serve Beverages Distribution; Crazy Cups; 26 Flavors, LLC; and
8 Office Coffee Services, LLC.

9 THE COURT: All right.

10 MR. WALLER: Good afternoon, your Honor. Brian
11 Waller, Thompson Hine, LLP, for defendants 24 Hour Oil
12 Delivery Corp.; MV Fuel Transport, Inc.; MV Fuel Transport 1,
13 Inc.; Associated Fuel Oil Corp.; Light Trucking Corp., 165
14 Street Realty Corp.; Park Avenue Associates, LLC; and John
15 Ahearn.

16 THE COURT: Thank you.

17 This is an appeal from the magistrate judge's
18 discovery order.

19 And Mr. Schafhauser -- did I even come close?

20 MR. NELKIN: You did a wonderful job.

21 THE COURT: Everyone else can be seated.

22 Do you want to be heard first?

23 MR. NELKIN: Yes. I appreciate the opportunity.
24 Your Honor I'm sure has read the paper, so I won't go through
25 everything but simply to highlight a couple of points.

1 Your Honor is aware of the procedural history here
2 which led up to Magistrate Judge Orenstein's ruling. I
3 respectfully submit that under the governing standard, with
4 every respect to Magistrate Judge Orenstein, the decision that
5 his Honor rendered should be vacated by your Honor. And I'll
6 go through the reasons.

7 First of all, as to my client, Mr. Friedman -- and
8 Mr. Friedman admittedly is in a little bit of a different
9 posture than a number of defendants -- Mr. Friedman, as your
10 Honor is aware, is a party to a written agreement that is at
11 the center of this case. It's the Two Rivers operating
12 agreement, your Honor.

13 And, in fact, when this case was commenced, the
14 plaintiff in this case said in his verified complaint at
15 Paragraph 647, and I quote: The Two Rivers operating
16 agreement is a valid and subsisting contract between plaintiff
17 and the other members of Two Rivers, including Friedman.

18 So, we have a valid and subsisting agreement. And
19 in that agreement, your Honor, in that agreement, the parties
20 stipulated to arbitration as follows, and I'm quoting now at
21 Section 11.1 of the agreement, which says, in relevant part:
22 All disputes with respect to any claim for indemnification and
23 all other disputes and controversies between the parties
24 hereto arising out of or in connection with this operating
25 agreement shall be submitted to a Beth Din arbitration in

1 accordance with Orthodox Jewish religion.

2 It then goes on to say, your Honor, and I'm quoting:
3 Except as set forth below, the parties stipulate that the
4 provisions of this paragraph shall be a complete defense to
5 any suit, action, or proceeding instituted in any federal,
6 state, or local court, or before any administrative tribunal
7 with respect to any controversy or dispute arising out of this
8 agreement.

9 And then what is set forth below is that:
10 Notwithstanding anything to the contrary, any party may seek
11 from the Court any provisional remedy.

12 So, the presumption under this agreement is that
13 except for provisional remedies, the parties are required to
14 go to a Beth Din and that this provision shall be a complete
15 defense.

16 As your Honor is aware, the plaintiff in this case
17 applied for a provisional remedy by way of order to show cause
18 that your Honor entered on December 2. That provisional
19 remedy was entered by way of a consent order for preliminary
20 injunction on January 19. So, what we're now talking about is
21 not a provisional remedy but merits discovery. That's what
22 was the issue before Magistrate Judge Orenstein, whether
23 merits discovery should proceed in the face of a written
24 arbitration agreement as to my client, which shall be a
25 complete defense.

1 As your Honor is aware, under the Federal
2 Arbitration Act, where, in fact, there is a written agreement,
3 if the Court is satisfied that that agreement covers a
4 dispute, under Section 3 it says that the District Court,
5 quote: Shall, on application of one of the parties, stay the
6 trial of the action until such arbitration has been had in
7 accordance with the terms of the agreement.

8 And that's what Section 3 says.

9 Your Honor, in a case entitled *Teah v. Macy's, Inc.*,
10 that we cited in the papers, recognized that under Section 3
11 of the Federal Arbitration Act, and I'm quoting now: A
12 district court, upon application by one of the parties, must
13 stay proceedings if satisfied that the parties have agreed in
14 writing to arbitrate an issue or issues underlying the
15 district court proceeding. The act, thus, leaves no place for
16 the exercise of discretion by a district court but, instead,
17 mandates that district court shall direct the parties to
18 proceed to arbitration on issues as to which an arbitration
19 agreement has been signed.

20 Again, *Teah v. Macy's*. In this case --

21 THE COURT: Well, we're not there yet, counsel. The
22 Court hasn't decided that, in fact, these are issues that are
23 subject to that arbitration clause. The phrase that you just
24 quoted was in the context of the Court enforcing the
25 arbitration laws, but we're not at that point, we haven't

1 gotten to that point. Indeed, that's what we need, to set
2 down dates for briefing on that point.

3 MR. SCHAFHAUSER: That's correct, your Honor, we
4 will be addressing in briefing. But in the meantime, I
5 respectfully submit that what we do have, because we've had it
6 from the very day that the case was filed, the agreement that
7 I'm referring to is an exhibit to the first filing docket;
8 literally, Docket Entry No. 1 is the written agreement that
9 contains an arbitration provision.

10 So, there may be a dispute by plaintiff as to which
11 of the various claims are subject to that agreement, but
12 certainly some of them are because, certainly, plaintiff
13 himself in his complaint says that he's bringing claims under
14 that agreement. So, certainly some of them are.

15 The answer by plaintiff cannot be that he's suing
16 under an agreement and yet there's no claims covered by that
17 same agreement. I don't think plaintiff can plausibly so
18 suggest.

19 So, your Honor is correct, that is a motion that we
20 have sought leave to file. But in the meantime, what I would
21 respectfully submit is that given the fact that there is as to
22 my client a written agreement to arbitrate at least some of
23 the provisions -- and we can debate in motion practice with
24 plaintiff which of those are subject to the agreement and
25 which are beyond --

1 THE COURT: Well, to the extent that some of them
2 are not subject to the agreement, then there's discovery to be
3 had.

4 MR. SCHAFHAUSER: But under the Federal Arbitration
5 Act, your Honor, the presumption is in favor -- as your Honor
6 is well aware, in favor of arbitration.

7 THE COURT: You mean even if claims aren't subject
8 to the agreement?

9 You're just saying that there may be an argument
10 that some of the causes of action are not subject to the
11 arbitration agreement. To the extent that that's the case,
12 then discovery would go forward on those claims.

13 MR. SCHAFHAUSER: I'm saying that plaintiff is
14 certainly arguing that there are some claims that are not
15 subject. What I'm saying is the presumption under the Federal
16 Arbitration Act is to read agreements to arbitrate broadly,
17 especially, whereas here, the agreement in question contains
18 language as to "arising under," all claims arising under.

19 We've cited case law which, in fact, so holds. For
20 instance, the Moses Cone case, 460 U.S. at 24, in which --
21 it's the Second Circuit -- I'm sorry, the Second Circuit at
22 WorldCrisa Corp. says at 129 F. 3rd 71: In accordance with
23 the strong federal policy in favor of arbitration, the
24 existence of a broad agreement to arbitrate creates a
25 presumption of arbitrability which is only overcome if it may

1 be said with positive assurance that the arbitration clause is
2 not susceptible of an interpretation that covers the asserted
3 dispute, doubts should be resolved in favor of coverage, end
4 quote.

5 So, under the governing law, I respectfully submit,
6 doubt should result in favor of arbitrability, not in favor of
7 nonarbitrability; and, therefore, the burden is not on my
8 client to demonstrate arbitrability, the burden is on
9 plaintiff to demonstrate that any claims he has asserted are
10 not subject are, in fact, not subject. The agreement is broad
11 and should be broadly construed.

12 Again, given the existence of the written agreement
13 that should be broadly construed under the Federal Arbitration
14 Act; given the statute, Section 3 of the Federal Arbitration
15 Act, which mandates a stay, as the Court held in *Teah v.*
16 *Macy's*, I respectfully submit that at a very minimum the Court
17 should stay merits discovery unless and until such time as the
18 Court has ruled on the threshold issue of whether my client's
19 entitled to go to arbitration and whether the entire case goes
20 to arbitration or whether a portion of the case goes to
21 arbitration. That is the threshold issue.

22 I cited a case in the papers by Judge Posner, the
23 CIGNA Healthcare case, 294 F. 3rd at 855, in which Judge
24 Posner said that: Allowing discovery to go forward before a
25 determination of whether the dispute is arbitrable -- and

1 these are his words -- puts the cart before the horse,
2 quote/unquote.

3 I respectfully submit that that is not the
4 appropriate way to proceed in this case. There is a
5 preliminary injunction that's been entered. There's no issue
6 as to a provisional remedy, we're talking about discovery on
7 the merits. The plaintiff would not be prejudiced or harmed
8 in the least by a brief stay. There would be no prejudice
9 whatsoever by a brief stay on merits discovery. He's already
10 got a preliminary injunction.

11 By contrast, if no stay were implemented, your
12 Honor, my client would be required to litigate a case in
13 federal court that he bargained under a signed written
14 agreement for the right to have arbitrated in a Beth Din. My
15 clients bargained-for rights would essentially be vitiated by
16 having to proceed on the merits in a case where there's a
17 written arbitration agreement.

18 I also wanted to point out, your Honor, that with
19 the argument raised by plaintiff in his papers that my client
20 purportedly waived his right to arbitrate, your Honor has now
21 received my letter on Friday which sets forth the facts of
22 that. And the facts are these, your Honor, in brief: At no
23 time before this case was filed did Mr. Friedman refuse to
24 arbitrate. In fact, he was moving in state court for the very
25 right to arbitrate.

1 How do I know? I was there. He moved to arbitrate.
2 And the state court judge, what she did is she entered a
3 provisional remedy --

4 THE COURT: In this case?

5 MR. SCHAFHAUSER: No, in a state court action.

6 THE COURT: A state court action involving lease
7 types in this case?

8 MR. SCHAFHAUSER: A state court action involving
9 claims brought by Two Rivers Coffee against Emil Friedman
10 personally in state court involving the same operating
11 agreements that we're talking about here, this very same
12 agreement. And those claims were brought by Two Rivers
13 through Mr. Schreiber and his other co-members against
14 Mr. Friedman in state court.

15 And what did Mr. Friedman do? He was the one, he
16 was the one, your Honor, who moved to compel arbitration in
17 state court. And the state court judge directed that except
18 for the provisional remedy, the parties, indeed, would be
19 required to submit to a Beth Din arbitration in accordance
20 with the agreement.

21 So, the two points I would make on that basis are,
22 number one --

23 THE COURT: They're not the same claims that were
24 raised and are raised in this case that you're talking about.
25 You're talking about different claims, different issues.

1 You're not talking about the claims that are the subject of
2 the complaint in this case, right?

3 MR. SCHAFHAUSER: They are different claims, right.
4 What I'm addressing is the argument that somehow Mr. Friedman
5 refused to go to arbitration --

6 THE COURT: The claim is not that he refused to go
7 to arbitration in that instance, it's in the separate instance
8 that the plaintiff here brought that he claims he refused to
9 go to arbitration, that he didn't pay the \$250,000, et cetera.
10 That's a different setting than the one that you're --

11 MR. SCHAFHAUSER: And as to that claim, by the
12 way --

13 THE COURT: That's the one he was claiming that he
14 didn't agree to arbitrate, not something else that happened in
15 another court.

16 MR. SCHAFHAUSER: But your Honor --

17 THE COURT: He decides to arbitrate some things but
18 he doesn't decide to arbitrate other things?

19 MR. SCHAFHAUSER: No, your Honor, and that's not
20 what happened.

21 What happened is not what the plaintiff is alleging.
22 He's not alleging that he ever brought the claims in this case
23 before the Maysharim. He's not alleging that. Because he
24 never did. He never brought RICO claims before the Maysharim.

25 But Mr. Friedman, in any event, whether the claims

1 are the same or different, Mr. Friedman never refused to do
2 what Maysharim directed on September 25 of last year. Mr.
3 Friedman, in fact, did what Maysharim directed. And Maysharim
4 on January 28 of this year held that Mr. Friedman had
5 satisfied its requirements and, thus, vacated the Heter.

6 So, in fact, the very rabbinical court that
7 plaintiff is now citing has ruled against plaintiff on the
8 issue of whether Mr. Friedman complied. That very rabbinical
9 court has ruled against plaintiff and in favor of my client.
10 So, the idea that Mr. Friedman failed to do what Maysharim
11 directed is belied by what Maysharim itself has ruled.

12 But, in any event, as to that issue, the plaintiff
13 did not rely on that interim award dated September 25. In
14 fact, in the correspondence that we submitted to your Honor,
15 the plaintiff sought clarification thereafter from Maysharim,
16 pointing out that there was no deadline for Mr. Friedman to do
17 what Maysharim had directed. And the plaintiff, as late as
18 five days before plaintiff commenced this action before your
19 Honor, five days before was sending submissions to Maysharim
20 asking Maysharim to enforce its jurisdiction.

21 So, plaintiff did not certainly rely on anything
22 that Maysharim did. And the best evidence of that, your
23 Honor, is plaintiff never sought to confirm or enforce
24 Maysharim's September 25, 2015, award until after I sought, on
25 behalf of my client, to enforce Maysharim's January 28 award.

1 Plaintiff never sought to enforce it, never bothered to,
2 wasn't important at the time for plaintiff. Now he claims he
3 relied on it.

4 So, for those reasons, your Honor, I respectfully
5 submit that the Court should stay discovery pending the
6 outcome of the motions that are to be filed under the Federal
7 Arbitration Act and governing law, and then we would ask for
8 your Honor to set an appropriate schedule as to the filing and
9 the hearing of those motions.

10 THE COURT: Thank you.

11 MR. SCHAFHAUSER: Thank you.

12 Your Honor, I have a separate application which I
13 don't know whether your Honor wants me to address now or --

14 THE COURT: Is this paying the rent?

15 MR. SCHAFHAUSER: Yes.

16 THE COURT: You can make that application to the
17 magistrate judge.

18 MR. SCHAFHAUSER: Thank you.

19 THE COURT: Does anybody else want to be heard in
20 connection -- I don't need arguments repeated, but if there's
21 anything that pertains to a given defendant, I'll hear it.

22 MR. GRANTZ: Your Honor, I just want to briefly
23 state --

24 THE COURT: If you would, I think it's hard for the
25 reporter to keep everyone straight, if you could state your

1 name.

2 MR. GRANTZ: Of course, your Honor. I apologize.
3 David Grantz.

4 I want to briefly state that it's our position that
5 Magistrate Judge Orenstein made his decision prematurely. The
6 issues of arbitration are before your Honor, and, as you
7 pointed out, it hadn't yet been decided. So, to the extent
8 that those issues are undecided, the issue of whether or not
9 discovery should move forward also should be in your Honor's
10 purview and it should wait until your Honor makes the decision
11 on arbitrability.

12 So, our position is his decision is clearly
13 erroneous because he appears to have determined the issue of
14 arbitration in making the decision to move forward with merits
15 discovery.

16 THE COURT: How does he appear to have made that
17 decision? He doesn't say he made that decision.

18 MR. GRANTZ: He doesn't say --

19 THE COURT: He says that there are questions about
20 the scope of the arbitration clause, the meaning of the
21 arbitration clause; he points out that a lot of the claims
22 would not be as to other of the defendants, are not subject to
23 the arbitration clause because those defendants weren't party
24 to it. But he doesn't determine the issue of arbitrability.

25 MR. GRANTZ: I think that's the point. He has

1 pointed out that there's open questions about those very
2 issues. And if there's open questions that still need to be
3 determined by your Honor, we shouldn't be going forward with
4 merits discovery in advance of deciding those open questions.

5 THE COURT: I thought you told me a moment ago he
6 took it upon himself to decide the issue of whether the claims
7 were arbitrable. He didn't do that.

8 MR. GRANTZ: I think that's the implication from his
9 questioning whether or not the arbitration agreement is
10 enforceable. He then reaches the determination that should go
11 forward when the question of whether there should or should
12 not be an arbitration needs to be decided in advance of
13 determining whether or not merits discovery should go forward.
14 I think the merits discovery should wait until your Honor
15 makes a determination as to the arbitrability issues.

16 Thank you, your Honor.

17 THE COURT: Thank you.

18 MR. BERGSON: Your Honor, Rob Bergson for Geoffrey
19 Hersko. Mr. Hersko is an attorney. He's referenced in
20 passing in this 226-page complaint.

21 The only basis for federal jurisdiction is the RICO
22 claim. The main defendant in the RICO claim is Mr. Friedman.
23 And you've heard from his counsel with respect to the
24 arbitration agreement.

25 It seems to me that the magistrate judge, when he

1 focused on the fact that there were many parties who were not
2 subject to arbitration, lost sight of the fact as to why we're
3 here. For discovery to go forward with respect to my client
4 when you have the main player in the RICO claim subject to an
5 arbitration window and the plaintiff as well, again --

6 THE COURT: But your client isn't subject to an
7 arbitration agreement, correct?

8 MR. BERGSON: He is not.

9 THE COURT: And he hasn't agreed to be bound by any
10 arbitration.

11 MR. BERGSON: He has not.

12 THE COURT: What happens to the claims against your
13 client, they just go away regardless of what happens in the
14 arbitration?

15 MR. GRANTZ: If the Court ultimately determines that
16 arbitration should proceed with respect to the principal
17 parties and Mr. Friedman, then my argument would be that the
18 balance of the action should be stayed. How can we go forward
19 with a RICO claim when the main parties are in arbitration?

20 And my client is just on the periphery. That, to
21 me, does not seem logical, and I don't think Magistrate
22 Orenstein took that into account in his decision.

23 THE COURT: But, ultimately, at some point the
24 clients have to come forward against your client regardless of
25 what happens in the arbitration, correct?

1 MR. BERGSON: Well, no, that's not --

2 THE COURT: How would you be positively impacted by
3 a decision in the arbitration such that the complaint could
4 never go forward against your client?

5 MR. BERGSON: Well, it does involve some degree of
6 speculation. We don't know what that decision would be.

7 THE COURT: If the decision found Mr. Friedman
8 liable and all of the -- assuming that it even has
9 jurisdiction to address RICO claims, your client wouldn't be
10 bound by that, right?

11 MR. BERGSON: That's correct. But it may well moot
12 this, the entire proceeding, in --

13 THE COURT: How would it do that?

14 MR. BERGSON: Again, I don't know at this point in
15 time, but, again, when you have the principal players and
16 they're in arbitration, the likelihood is very strong that
17 will occur.

18 In addition, we have a 12(b)(6) motion that we will
19 be making. To compel my client to go through with discovery
20 at this point under these circumstances when he's on the
21 periphery of this claim, he's barely mentioned in this
22 complaint, there is an arbitration provision with the
23 principal parties, doesn't make sense.

24 THE COURT: Okay. Thank you.

25 MR. FELDMAN: Good afternoon, your Honor. Richard

1 Feldman for Michael Devine.

2 Like Mr. Hersko, Mr. Devine is an outside
3 accountant. The two enterprises that have been identified in
4 the complaint are the Friedman enterprise and the Friedman
5 Birnbaum enterprise. If Mr. Friedman is determined not to
6 have violated any of the obligations under the operating
7 agreement and is not found to be liable in any way, then the
8 enterprises themselves could not exist.

9 THE COURT: If who finds them?

10 MR. FELDMAN: Because they're claiming that
11 Mr. Friedman --

12 THE COURT: But you say if he is found not to be
13 part of an enterprise. Found by whom?

14 MR. FELDMAN: By the arbitrators. If he's found not
15 liable for any misdoings, if he's found not to have taken any
16 money inappropriately, if he's found not to have overbilled.
17 Those are the essence of the claims.

18 THE COURT: So, would that preclude plaintiff from
19 proceeding against you in a RICO claim here?

20 MR. FELDMAN: Absolutely.

21 THE COURT: I wouldn't be bound by any finding of
22 that --

23 MR. FELDMAN: Well, as --

24 THE COURT: I, or a jury, let's say, could find
25 without Friedman being a defendant. But it's possible that a

1 jury could find that Friedman was, in fact -- there was an
2 association, in fact, there was a RICO of which he was a part,
3 and that your client was a part of it, regardless of what
4 happened in the Beth Din, correct?

5 MR. FELDMAN: If the Beth Din finds that there was
6 no wrongdoing, that would be collateral estoppel as to those
7 facts. If they find that there have been no --

8 THE COURT: You're saying plaintiff would be
9 collaterally estopped from arguing in this case that --

10 MR. FELDMAN: Absolutely. If they find that the
11 reclassification of commissions has building construction
12 expenses, in fact, was proper and those were construction
13 expenses, how then can you relitigate that issue here if the
14 Beth Din determined that those were proper?

15 THE COURT: Okay. So, you're arguing collateral
16 estoppel.

17 MR. FELDMAN: I am, your Honor. And I think it's a
18 very strong argument because the underlying claims are all the
19 same, based upon the same facts. And the allegation is that
20 Friedman was the hub --

21 THE COURT: Of course, the other way around, you're
22 not collaterally estopped. So, assuming that the Beth Din
23 decided everything that the plaintiff, in fact, said was
24 correct about all of the wrongdoing, you're not bound by that.

25 MR. FELDMAN: Correct. They'd still have to show

1 that my client was a knowing participant and not simply an
2 outside accountant who received information from management,
3 and there was an in-house controller, Vincent Papa who
4 provided information to him, and he did what any outside
5 accountant who doesn't do a review or audit but simply does a
6 tax return or payroll tax return: They have to show that he
7 actually knew and was part of that conspiracy --

8 THE COURT: Quite apart from your client, would you
9 be bound by the findings that Friedman was involved?

10 MR. FELDMAN: I haven't thought about that, your
11 Honor. I'm not sure, I'm not sure about that.

12 THE COURT: All right.

13 MR. FELDMAN: These would be -- my client, there
14 would be other hurdles that the plaintiff would have to reach
15 in order to reach my client. That's part of the nature of my
16 12(b)(6) motion. I don't believe they've alleged enough that
17 he's part of an enterprise and that he directed and there are
18 various other issues.

19 THE COURT: Okay. Thank you.

20 Anyone else want to be heard on this discovery?

21 MR. FINKEL: Your Honor, I represent three
22 employees; two bookkeepers and the mechanic. They were not --

23 THE COURT: I'm sorry, sir?

24 MR. FINKEL: I'm Richard Finkel. Sorry, your Honor.
25 I represent Sylvia Ezell, who is a bookkeeper for several of

1 the defendant entities; Sonia Rivera, who is the bookkeeper
2 for Two Rivers; and Jorge Salcedo, who is a mechanic.

3 Your Honor, from my client's perspective, this case
4 is simply for control of Two Rivers. My clients are not
5 involved in that. They're, excuse the expression, merely
6 employees. They followed the directions that the owners,
7 whether it be plaintiff or defendant Mr. Friedman or the other
8 managers, provided to them.

9 If this proceeding goes to arbitration and the
10 arbitrators rule in favor of Mr. Friedman, then for sure there
11 would be no basis for proceeding against my clients, and I
12 agree that collateral estoppel would bar that. And I would
13 respectfully suggest that given my clients' position as
14 alleged by plaintiff in the complaint, even if plaintiff
15 prevailed in the arbitration, it's more likely than not that
16 there would be still no basis for proceeding against my
17 client.

18 Your Honor, most respectfully, I was very impressed
19 with the decision of Judge Gleeson that we cited to your Honor
20 in *Acquaire v. Canada Dry*, which I think is very similar to
21 this case, albeit that case is much larger and more
22 complicated. It too was involving in RICO, but it involved a
23 host of other claims, including securities claims, and I
24 forget the number, a hundred some odd parties, not the dozen
25 parties that we have here. And the vast majority of parties

1 in that case were not subject to the arbitration agreement.

2 Judge Gleeson determined that the claims against the
3 parties not subject to the arbitration agreement were
4 peripheral and that whatever the determination of the
5 arbitrators would be against the principal parties -- here,
6 Friedman and Schreiber -- that would be at least instructive
7 and assisting in determining and moving forward more
8 efficiently on any civil case in court that might survive --
9 that might survive -- and, also, that it was possible that the
10 arbitrators could resolve the whole package.

11 Given that situation, most respectfully, following
12 the logic and analysis of Judge Gleeson, this case is an
13 easier one to decide because it's smaller, less parties, and
14 less complicated. I respectfully suggest to your Honor that
15 Judge Gleeson was correct: The Federal Arbitration Act and
16 the decisions of the Second Circuit and the other federal
17 courts across the country are clear. There's a presumption
18 towards arbitration. The arbitration provision in the
19 operating agreement is a very broad one, and it clearly
20 encompasses probably all of the claims in this case, certainly
21 the most substantial of the claims in this case.

22 Decide the arbitration issue first. Why put all the
23 parties through the expense and the toil of discovery and of
24 other motion practice? The RICO motions, the substantive
25 motions, for example, may be unnecessary. If your Honor

1 decides that arbitration is appropriate in this situation,
2 then we don't have to do any of those things, we just wait for
3 the arbitrators and proceed as they direct. I think that's
4 what the Arbitration Act provides, I think that's what the
5 decisions of the Court indicate should be done.

6 Thank you.

7 THE COURT: Let me ask if this is the case: Is it
8 the view of the other defendants here that the issue of
9 arbitrability should be first briefed and not the balance of
10 their motions? Is every defendant of that view?

11 MR. FINKEL: That's my view, your Honor, because I
12 think the threshold issue is arbitration.

13 THE COURT: I don't know that that's anyone else --

14 MR. FINKEL: If your Honor decides that this case
15 should go to arbitration and stayed -- the main parties, the
16 plaintiff and Mr. Friedman, should go to arbitration and that
17 the other parties involved are peripheral and stay the other
18 parties, then there's no need to present 12(b)(6) motions on
19 substantive issues regarding RICO. It becomes not appropriate
20 at that time.

21 At a later date it might be appropriate, but more
22 likely not because there is a very substantial chance, maybe a
23 little likelihood, that the result of the arbitration will
24 either necessarily or just as a practical matter resolve the
25 whole case and we don't have to do 12(b)(6) motions and we

1 don't have to go through the expense and the toil of doing
2 12(b)(6) motions and we don't have to do merit discovery.

3 It seems if you read Judge Gleeson's opinion, I
4 think that's what he had in mind. Why burden this Court with
5 all this extra work and the parties with all the work and
6 expense if the parties have already made one agreement, the
7 threshold agreement: Arbitration. That's what they bargained
8 for, that's what they should have.

9 THE COURT: I didn't understand that to be the
10 position of the other defendants in this case.

11 MR. FELDMAN: Your Honor, I just canvassed everyone
12 else sitting at the defense table, and we're all in agreement
13 that the issue of arbitrability is a threshold issue and
14 should be determined because it may end the case once the
15 arbitration goes forward.

16 MR. SCHAFHAUSER: That is, indeed, the position,
17 your Honor. The first thing we raised when we made an
18 appearance was the premotion request to compel arbitration to
19 dismiss on that basis. So, we do agree.

20 MR. GRANTZ: Your Honor, when we were here last,
21 your Honor directed us to address the 12(b)(6) motions as part
22 of the overall motions. That's the reason why we presented
23 our motions together, because I believe you said you didn't
24 want to see --

25 THE COURT: I did, I did. But I didn't understand

1 that you had all taken this position, that you shouldn't have
2 to make those motions now, that the arbitration should be
3 decided first. I didn't realize you had taken that position
4 previously.

5 MR. GRANTZ: We all are uniformly in agreement that
6 we would like to see the Court determine the arbitration issue
7 first and foremost and then the stay issue if that arbitration
8 is granted to the main defendant or any of the other
9 defendants. That's, I think, the joint understanding.

10 THE COURT: Let me ask a question: Assuming that
11 this case did go to arbitration, are you all willing to be
12 bound by the findings of the arbitration?

13 MR. GRANTZ: To the extent that the arbitration
14 includes my clients and we are participating, yes. We've
15 asked in the motion that we were prepared to make in our
16 premotion letter to be joined with the defendant, at least my
17 clients have, and go to the arbitration as well. That was
18 certainly part of our premotion letter, and we'll be seeking
19 that relief --

20 THE COURT: I'm sorry, explain more clearly the
21 nature of that relief. The arbitrator --

22 MR. GRANTZ: My clients would be willing to go to
23 the arbitration with Mr. Friedman. The E&J defendants would
24 certainly be prepared to arbitrate before a Beth Din, and I
25 think we outline --

1 THE COURT: Right. But you don't have any agreement
2 to do that.

3 MR. GRANTZ: That's correct.

4 But there are some cases in this district and in
5 other districts where defendants that did not have arbitration
6 agreements that were signed, the Court determined that the
7 appropriate place for resolution would be to have all of those
8 parties go to the arbitration.

9 So, I think we cited those cases, your Honor, in the
10 premotion letter. And that's the basis on which we will be
11 asking for that relief.

12 THE COURT: Are all the defendants asking to be part
13 of that arbitration?

14 MR. GRANTZ: I'll let the other defendants speak for
15 themselves, but my clients are certainly asking for that.

16 MR. BERGSON: Your Honor, Rob Bergson for Geoffrey
17 Hersko.

18 My client would not want to participate in the
19 arbitration and does not believe that he would be bound by it;
20 however, the argument that was made that the threshold issue
21 should be arbitrability still holds true, whether or not my
22 client participates in that. Certainly, it would obviate the
23 12(b)(6) motions, it would obviate a decision on whether or
24 not discovery should be stayed, I guess to a certain degree.

25 So, we're all in agreement that a motion as to

1 arbitrability should be decided first, but the defendants are
2 differently situated as to who would be willing to go to
3 arbitration and who wouldn't.

4 THE COURT: Who else is willing to go to arbitration
5 that's not bound by an agreement?

6 MR. FINKEL: Your Honor, I've actually discussed
7 this with my clients, and two of them would be willing and the
8 third is thinking about it, quite candidly, your Honor.

9 MR. HELLER: Your Honor, Maurice Heller for Solomon
10 Birnbaum, 26 Flavors, Office Coffee Services, et cetera.

11 My clients have a separate arbitration agreement.

12 THE COURT: I'm sorry?

13 MR. HELLER: My clients have a separate arbitration
14 agreement with Two Rivers Coffee, which is the party in
15 interest here. This is a derivative action. An issue -- and
16 it has virtually the same language compelling arbitration as
17 does the language of the Two Rivers operating agreement, also
18 compelling it to arbitrate before an Orthodox Jewish Beth
19 Din --

20 THE COURT: That's not the claim being litigated
21 here. The fact that you have that agreement with some other
22 entity isn't the issue. The question is: Would you be
23 willing to have the arbitrator selected under the operating
24 agreement judge the merits of your client's case?

25 MR. HELLER: Your Honor, my client has a provision

1 that specifically selects the Beth Din of America, which is a
2 specific --

3 THE COURT: A provision with whom?

4 MR. HELLER: With Two Rivers Coffee, which is the
5 party in interest on the other side. This whole action is
6 being brought derivatively by Mr. Schreiber.

7 THE COURT: So, you think the whole case should be
8 brought before some other Beth Din.

9 MR. HELLER: The claim's that my clients' should.

10 And the plaintiff has raised questions in response
11 to my application to make a motion to compel arbitration,
12 alleging that certain assignments, the obligations on my
13 client's side of that contract, and they've used all kinds of
14 hyperbole such as fraud, et cetera, et cetera, basically
15 questioning the validity of those assignments.

16 Those were assignments that were done pursuant to
17 the contract. If they have questions, they can be raised
18 before the Beth Din. That's the way this works, your Honor.
19 There is a provision in the contract which specifically says
20 that the contract is assignable for my clients. So, if they
21 want to raise that, that's fine. Putting aside all hyperbole,
22 that's certainly something that can be raised later on.

23 But, yes, my clients, the entirety of their
24 relationship with Two Rivers Coffee is governed by this
25 contract. The other aspect of their relationship is that they

1 share a common derivative member, Mr. Friedman. To the extent
2 that Mr. Friedman's claims go to arbitration, everything that
3 involves those particular activities that they claim my
4 clients had some participation in would go to arbitration
5 before the panel that's already operating in that regard.

6 With regard to those claims, your Honor, I would be
7 happy to discuss it with my client. I think my client would
8 consent, most likely, to have a talk with them about it, to
9 have those claims arbitrated and have them involved in that
10 arbitration as well.

11 THE COURT: Who haven't we heard from of?

12 Mr. Waller?

13 MR. WALLER: Yes, your Honor. I filed letters on
14 behalf of the seven oil trucking --

15 THE COURT: Right.

16 MR. WALLER: -- and also Mr. Ahearn individually
17 seeking to compel arbitration as to my clients. So, my
18 clients would consent to have the issues in the complaint
19 arbitrated.

20 THE COURT: Mr. Feldman?

21 MR. FELDMAN: I spoke to my client about it a month
22 ago, and at the time he was not inclined to arbitrate. He
23 doesn't speak Yiddish, he had some concerns about how a Beth
24 Din for Orthodox Jews is run, and, so, I dropped it at that
25 point. I haven't spoken to him since.

1 So, I don't have an answer for your Honor. I didn't
2 know that that was one of the issue that would come up today.

3 THE COURT: Do you want to be heard?

4 MR. NELKIN: Yes, your Honor.

5 As I understood it, this was to be an oral argument
6 with respect to the appeal of the discovery order by Judge
7 Orenstein, as opposed to a discussion as to the merits of
8 their respective requests to arbitrate or to stay this.

9 THE COURT: Well, that's certainly relevant to the
10 issue, isn't it?

11 MR. NELKIN: I understand that.

12 It's our position that -- I believe that the
13 defendants have backed off their original position, it sounds
14 like, that all discovery should be stayed. It certainly
15 appears that they're now conceding that discovery should take
16 place with respect to issues of arbitrability, I assume with
17 respect to issues of compelling or confirming arbitration, and
18 I think --

19 THE COURT: What discovery is that? What is the
20 discovery that's needed in terms of determining arbitrability.

21 MR. NELKIN: Well, we've argued that the defendant
22 has refused to arbitrate, Mr. Schafhauser has put some things
23 into the record; we certainly think that is a subject for
24 discovery.

25 We think that Mr. Schafhauser in his own filing

1 originally with respect to this issue, Docket No. 90, on Page
2 1, and also Footnote 1 on that same thing, indicated that this
3 was things that declarations and a record was necessary to
4 determine. And I think that the case law in the Second
5 Circuit is clearly -- is clear that when the issue of
6 arbitrability is on the table, when the issue of confirming an
7 arbitration award is on the table and the issue of compelling
8 arbitration is on the table, that those are all things that
9 are subject to discovery, it's a Rule 56 standard, and, as a
10 result, parties are entitled to the full range of discovery
11 techniques to determine the issue that may be relevant to the
12 issue of arbitrability.

13 THE COURT: Have you had specific discovery requests
14 towards that issue?

15 MR. NELKIN: We have requested a number of requests
16 towards that issue, but we also think that there would be
17 additional discovery, depositions, requests for admissions,
18 and things like that that would go towards that as well.

19 We think that there are issues with respect to the
20 issue of the fairness and impartiality of particular
21 arbitration panels and things of that sort that also would be
22 at issue.

23 THE COURT: Have you sought discovery on that?

24 MR. NELKIN: Yes, we have.

25 THE COURT: What kind of discovery have you sought

1 on that.

2 MR. NELKIN: Well, we've asked for all
3 communications with different Beth Dins, we asked for all
4 communications, we've asked for transfers of -- documents with
5 respect to payments towards Beth Dins, we've asked for a
6 number of things about that. But we also believe that
7 additional discovery, particularly depositions and requests
8 for admissions, would be important to that regard.

9 THE COURT: You talk about fairness. How is that
10 issue raised?

11 MR. NELKIN: Well, to the extent that Mr. Friedman
12 is seeking to compel arbitration before a particular Beth Din,
13 then we think that to the extent that there are payments to
14 that Beth Din, that there's been ex parte communications with
15 that Beth Din, things of that sort would be important to
16 determine beforehand.

17 We also think that once there has been an issue
18 that's raised, all the other defendants have raised with
19 respect to arbitrability and whether they're intertwined with
20 Mr. Friedman, they have tried to minimize their roles while at
21 the same time saying they're completely intertwined. But we
22 believe that discovery is appropriate into their roles and
23 their actions by which they're claiming that their actions and
24 the claims that we've asserted against them are intertwined
25 with any other claim that might be arguably subject to

1 arbitration.

2 We think that none of these other parties have an
3 arbitration agreement with our client with the exception of
4 Mr. Heller's clients, which we've raised issues with. We
5 think that that's a subject for discovery. We believe there
6 are forged documents or fraudulent documents. We think that's
7 grounds for discovery. Just for an example there, the
8 provisions that he is seeking to rely on have been assigned
9 based on Brian Sanders' member assigning them, yet in both his
10 Rule 26.1 disclosures and in his prior statements before other
11 tribunals he's argued that Mr. Friedman and Mr. Birnbaum own
12 that company, or one of Mr. Friedman's companies owns it, and
13 Brian Sanders appears nowhere as a member.

14 To the extent they're arguing that there is a
15 contract that's been signed, we think that we're entitled to
16 discovery as to whether it's signed by an authorized party and
17 whether it was a true and not fraudulent document.

18 THE COURT: Go ahead and address the magistrate
19 judge's order, if you would.

20 How are you prejudiced by it, this stay of discovery
21 at this point?

22 Assuming we were to decide just to do briefing on
23 the issue of arbitration and were to decide that issue first,
24 let's say, if we now were at that issue, how would you be
25 prejudiced by that?

1 MR. NELKIN: If I could ask for your Honor to
2 clarify one point for me.

3 Are we assuming that there would be discovery with
4 respect to arbitrability?

5 THE COURT: Right. Assuming there's discovery with
6 regard to the question of arbitrability but not full-blown
7 merits discovery.

8 MR. NELKIN: We would think --

9 THE COURT: How would you be prejudiced by the lack
10 of let's say full-blown merits discovery if you were permitted
11 discovery on the questions and issues that you've talked
12 about?

13 MR. NELKIN: Again, I think that the issue would be
14 that the defendants couldn't object to the scope as to they're
15 claiming on the one hand that their claims are so intertwined
16 we would have to have some leeway to explore those types of
17 things, which I think would raise issues with respect to
18 duplicative discovery in that if you're asking someone about
19 their role in connection with Mr. Friedman, then it seems to
20 me that that's also something that might go to the merits of
21 the case later, their interactions and things of that sort.
22 So, I think that there's some overlap between when they're
23 claiming that they should somehow come into his arbitration
24 and the merits-based exploration.

25 Now, I do think that with respect to the order that

1 has been entered, the order that's been entered, the
2 preliminary injunction, it does give us access to all of their
3 documents and electronic documents that are not -- well, all
4 of their stuff without restriction -- I think their words were
5 without qualification or anything else -- that pertain to Two
6 Rivers. So, to the extent that was to be made available as
7 opposed to them objecting that we have to wait for that, then
8 that would go towards minimizing some of the --

9 THE COURT: I'm sorry, I thought you said you do
10 have access to it now.

11 MR. NELKIN: It was entered in the order, but they
12 had told us that we have to wait for discovery to get that.
13 So, to the extent that we're allowed access to that material
14 in accordance with what we think are the clear wording of the
15 order, then that would minimize any prejudice that we suffer.

16 But they've taken the position that we can't have
17 any of that and I said we were going to make an application
18 to --

19 THE COURT: So, if you got that material, would that
20 be the kind of discovery that you need that we could go
21 forward with a briefing on the arbitration issue?

22 Would that give you what you need to do that before
23 we get into full-blown discovery?

24 MR. NELKIN: I believe if we were granted that, that
25 would go a long way towards it.

1 THE COURT: So, what is it that you're seeking to be
2 granted, so it is clear?

3 MR. NELKIN: The order calls for -- it allows us to
4 inspect and copy any books, records, electronically-stored
5 data, or other documents related to or pertaining to Two
6 Rivers, including, but not limited to, all bank statements,
7 wire transfers, checks, registries, and all financial records
8 of Two Rivers.

9 THE COURT: And you don't have access to that now
10 under the order?

11 MR. NELKIN: No, the order has been entered. We've
12 requested dates to go and inspect and copy and they've told us
13 that we're not entitled to in their view of the...

14 THE COURT: Mr. Schafhauser, if you don't want to go
15 through full-blown discovery here and plaintiff's counsel is
16 making the reasonable proposition that if they got this
17 material we could go forward without the other material and
18 resolve the issue of arbitrability, why can't you do that?

19 MR. SCHAFHAUSER: What your Honor has just heard
20 from plaintiff's counsel is an application that he's not made
21 to your Honor or Magistrate Judge Orenstein.

22 THE COURT: Well, is it in the order?

23 MR. SCHAFHAUSER: He's not telling your Honor what's
24 in the order. He's misreading the order. Let me explain what
25 Mr. Nelkin is talking about, but, again, this is not an

1 application that he's ever submitted.

2 THE COURT: I know. This is something that we're
3 talking about. All the defendants at the table are screaming
4 bloody murder about all of this discovery and we can't go
5 through this before you solve this issue. Counsel for the
6 plaintiff comes up with an alternative, which is something he
7 says he's entitled to in the order. This was in response to
8 my question: How can we narrow this? What is it that you
9 need now as opposed to what I think the magistrate judge has
10 ordered, which is full-blown discovery? And you've got to
11 show me that that decision of his is clearly erroneous.

12 So, the reason counsel hasn't made this argument
13 before is because I'm sitting here trying to explore some way
14 that might be helpful to both sides.

15 MR. SCHAFHAUSER: Let me explain what plaintiff's
16 counsel is telling your Honor.

17 When the Court initially issued the temporary
18 restraining order on December 2 that plaintiff sought for and
19 asked and the Court entered an order, and in that order the
20 Court set forth that defendant should be required to show
21 cause as to several items, one of those items was -- and there
22 were eight items. And one of those items was that Two Rivers
23 should not be allowed to -- should be, I'm sorry, the
24 defendant should be enjoined from, and I quote, destroying,
25 altering, concealing, removing, or disposing of or refusing to

1 permit authorized representatives of Two Rivers or the
2 plaintiff to inspect and copy any books, records,
3 electronically-stored data, or other documents related to or
4 pertaining to Two Rivers, including, but not limited to, bank
5 statements, wire transfers, checks, registries, and all
6 financial records of Two Rivers.

7 So, the point was that the defendants should be
8 enjoined from destroying, altering, concealing, removing or
9 disposing of, or refusing to permit access to books and
10 records.

11 We have -- and by the way, that language, then,
12 found its way into the preliminary injunction order that was
13 entered, as well as the other eight items that were entered in
14 the preliminary injunction.

15 We have not violated or refused to provide access.
16 But what plaintiff is asserting, what plaintiff is asserting,
17 your Honor, is that that provision means that it need not even
18 serve discovery requests. It need not even demand under the
19 Federal Rules of Civil Procedure of 1B discovery that need not
20 specify requests, that that provision means that every single
21 document, so long as it's conceivably related to Two Rivers,
22 must be produced in the ordinary course.

23 That's not what that order provides. It prevents
24 the destruction, concealment, or refusing to permit access to
25 books and records. We produced the books and records to Two

1 Rivers pursuant to Magistrate Judge Orenstein's order that was
2 entered on December 14. The books and records are in the
3 possession of Vincent Papa, Two Rivers' CFO. So, that
4 document -- that provision has nothing to do with discovery as
5 to whether a Beth Din arbitration is necessary.

6 What plaintiff is seeking to do -- and I was
7 listening carefully -- plaintiff said something else a moment
8 ago in response to your Honor's question. Your Honor asked
9 what discovery was necessary, and the answer was: Well, there
10 would be discovery as to whether the co-defendants are
11 intertwined because they claim to be intertwined.

12 What the co-defendants claim to be is co-defendants
13 in a lawsuit that plaintiff commenced. He was the one who
14 intertwined everyone by allegations in the complaint. He's
15 the one who intertwined them. There's no discovery necessary
16 as to whether the defendants are intertwined. They're
17 co-defendants. That's the argument in term of arbitration.

18 And in terms of the other arbitrability issues, as
19 to my client, I heard Mr. Nelkin talk about fraudulent
20 documents, I believe he said, or forged documents with respect
21 to Mr. Heller's client, but as to my client there's no forged
22 operating agreement. The document has been admitted to be
23 valid and enforceable. In fact, that's the whole point of the
24 case, is to seek enforcement of that operating agreement.

25 So, there's no issue as to my client, no issue

1 regarding whether or not there is a valid agreement to
2 arbitrate, and there's been no showing, your Honor, I
3 respectfully submit, as to a need for discovery as to my
4 client on the arbitration issue.

5 THE COURT: What would be the problem with
6 permitting plaintiff to examine all of these records? What's
7 the problem with that?

8 I mean, these are records that the order refers to,
9 not that you're restrained and enjoined from destroying, et
10 cetera, but what would be the burden of having plaintiff
11 examine those records?

12 MR. SCHAFHAUSER: The books and records of Two
13 Rivers have been produced.

14 THE COURT: To who?

15 MR. SCHAFHAUSER: To Two Rivers CFO, Vincent Papa.

16 THE COURT: Okay.

17 MR. SCHAFHAUSER: What I'm saying is Mr. Nelkin is
18 making a different argument. Mr. Nelkin is saying that any
19 document that exists in the world, to the extent that he
20 claims it's related to, must be immediately produced. That's
21 what he's saying; notwithstanding what the discovery rules
22 provide for, it must be produced. I respectfully submit
23 that's not what this order provides. And that was the issue
24 that we were addressing, which, again, he didn't raise before
25 today, so I'm kind of addressing it on the fly, but that's the

1 issue that I believe he's addressing.

2 To go back to Mr. Finkel's comment, which your Honor
3 had asked most other counsel, obviously, as to my client, my
4 client would be, of course, bound by a ruling by a Beth Din.
5 So, that's not an issue.

6 I do respectfully submit, your Honor, that the best
7 approach would be to address as a threshold matter the
8 arbitration issue. And to Mr. Nelkin's point, no, we don't
9 concede -- I don't concede anyhow, I can't speak for others --
10 I don't concede that there are genuine issues of material fact
11 as to the arbitrability of the claims against my client. I
12 believe that -- and that's really the standard. It's akin to
13 a summary judgment standard. I believe that the document is
14 clear and unambiguous on its face, and courts like your Honor
15 construe and enforce written agreements all the time and can
16 and should do so here as well in favor of arbitration. So,
17 there's no issue.

18 He says payments to a Beth Din. I don't know what
19 he's referring to. I haven't seen a single shred of evidence
20 about a payment, but he hasn't raised a material issue. It's
21 easy to stand up and say so in a courtroom, but he hasn't
22 raised a material issue.

23 THE COURT: Why wouldn't he be entitled to discovery
24 on something like that?

25 Assuming there were payments to a Beth Din or there

1 was some influx of e-mails back and forth, why wouldn't he be
2 entitled to discovery? There have been a lot of odd
3 circumstances going on in connection with how these cases have
4 been proceeding.

5 Why isn't he entitled to discovery? If the answer
6 is there's none, there's none, but why wouldn't he be entitled
7 to discovery?

8 Wouldn't it make a difference whether you enforced
9 an arbitration clause if they were able to show someone walked
10 in with a cloth sack with half a million dollars in hundred
11 dollar bills?

12 MR. SCHAFHAUSER: Of course it would make a
13 difference.

14 THE COURT: Okay. So, why isn't he entitled to
15 discovery?

16 MR. SCHAFHAUSER: Because he hasn't made a plausible
17 prima facie showing of any such thing. What he's shown are
18 two indisputable things. The Beth Din that we're talking
19 about, your Honor, is the Beth Din that plaintiff chose, not
20 me.

21 THE COURT: But your client went to another one in
22 the interim, correct?

23 MR. SCHAFHAUSER: But that's not the one we're
24 talking about.

25 THE COURT: I know. And now he's back to the one

1 that they went to at first.

2 But in the interim, he went to another one, correct?

3 MR. SCHAFHAUSER: That is correct.

4 THE COURT: Okay.

5 MR. SCHAFHAUSER: That is correct. But we're not
6 talking about that, we're talking about enforcing the award of
7 the Beth Din that plaintiff chose. So, unless he's talking
8 about payments to his own Beth Din, I don't see --

9 THE COURT: Thank you, counsel.

10 What is the minimum you need?

11 I take it you don't have any position with whether
12 we proceed on the motions to dismiss at this point. In other
13 words, do you object to first deciding the question of
14 arbitrability?

15 MR. NELKIN: No, your Honor.

16 THE COURT: So, we'll decide that question first.

17 What discovery do you need on that?

18 Can you limit discovery demands that you need to
19 address that issue?

20 MR. NELKIN: First off, your Honor, we read the
21 preliminary injunction dramatically differently.

22 THE COURT: Show me what provision you're relying on
23 that you view it as their having to produce the information to
24 you.

25 MR. NELKIN: No, but they have to at least make it

1 available for inspection and copying.

2 THE COURT: Okay. Where's that?

3 MR. NELKIN: On Page 3, numbered paragraph five.

4 First off, this is not limited to the books and
5 records of Two Rivers, it's for all defendants, which means
6 all the oil company defendants, all the coffee company
7 defendants, the accounting firm, the law firm. We're entitled
8 to see the documents that pertain to Two Rivers. That was
9 what they agreed to without qualification when they wanted to
10 get out of discovery the first time around. That's why...

11 And, so, we think that this is clear and we put that
12 into our papers; it's not only paragraph five, but it's the
13 first paragraph where it starts on page --

14 THE COURT: All right. So, if you were granted the
15 right to inspect books and records, et cetera, under paragraph
16 five, you need that. That's what you want to have now.

17 MR. NELKIN: We need that and we need that to be
18 clear that that covers any contact with any Beth Din of any
19 sort by Mr. Friedman or any of his agents or any of the other
20 defendants. And I think we would like a deposition of
21 Mr. Friedman as well.

22 THE COURT: Okay. So, you want the enforcement of
23 paragraph five and the deposition of Mr. Friedman.

24 MR. NELKIN: Correct.

25 THE COURT: And that is what you need to address the

1 initial issues.

2 MR. NELKIN: I believe so.

3 THE COURT: Okay. Sounds fair to me.

4 MR. SCHAFHAUSER: Again, your Honor --

5 THE COURT: Look what it says. It says: Refusing
6 to permit a representative to inspect and copy books.

7 That's what it says.

8 MR. SCHAFHAUSER: Again, it does, but Mr. Papa, Two
9 Rivers CFO, has the books and records. What this refers to is
10 destroying, altering, concealing, removing, disposing or
11 refusing to permit.

12 I haven't refused to permit inspection of books and
13 records. Mr. Papa has the books and records. That's the --
14 Mr. Papa has the books and records. We produced what we have
15 in our possession, custody, and control to Mr. Papa on shortly
16 after December 14, when this was a subject of a hearing before
17 Magistrate Judge Orenstein.

18 That's why I say -- this was on December 14, it's
19 now March 8, and all of a sudden plaintiff is alleging that --

20 THE COURT: Do you have access to what's been
21 submitted to Mr. Papa?

22 MR. NELKIN: What's been submitted to Mr. Papa is
23 about one banker's box worth of stuff. And Mr. Papa says as
24 far as the missing books and records, they're too numerous to
25 list. He sent that to Mr. Schafhauser in response to

1 Mr. Schafhauser's communication back and forth with him. But
2 this is not about just some narrow category of Two Rivers
3 books and records, this is about the documents for the
4 different defendants. They're claiming that they're
5 intertwined.

6 THE COURT: What documents? What other documents
7 are you looking for there?

8 MR. NELKIN: Well, they're --

9 THE COURT: Have you made a discovery request that
10 encompasses this paragraph?

11 MR. NELKIN: Yes, we have.

12 THE COURT: Which discovery request is that?

13 MR. NELKIN: I don't remember the exact number, but
14 we simply copied the wording of this and put it into a
15 discovery request. We also put in others with respect to the
16 Beth Din that were more particular, communications and things
17 with particular people.

18 For instance, there are e-mails that Mr. Schafhauser
19 has attached to this Court's record that show communications
20 back and forth with Beth Dins from e-mail accounts that we're
21 unfamiliar with, like lotsarich@aol.com. That was subject to
22 discovery requests that we've put in, different names we've
23 been able to glean. But we're just trying to get the
24 information that we don't have access to.

25 But it's not the books and records of Two Rivers

1 solely, although we don't even think that that's been
2 produced. This has got to do with the documents that pertain
3 to Two Rivers that are in the possession of the other parties.
4 Mr. Grantz's clients produced not a single document;
5 Mr. Bergson's clients produced not a single document; Mr.
6 Devine produced some tax documents, although they still don't
7 have the signed tax returns; Mr. Waller's people have produced
8 no documents; Mr. Birnbaum's companies have produced no
9 documents; and Mr. Ezell and his clients -- Mr. Finkel's
10 clients, who are the bookkeepers for Two Rivers, produced no
11 documents.

12 MR. FINKEL: That's not correct, your Honor. In
13 accordance with Magistrate Judge Orenstein's order, my
14 clients, the two bookkeepers, turned over their passwords for
15 Two Rivers' books. All the Two Rivers books, your Honor, are
16 in the cloud. They have the passwords. They have everything.
17 They have full and complete access to Two Rivers' books. All
18 of them.

19 And there was a complaint that they alleged that
20 certain boxes were taken out at some time when one of my
21 clients, Ms. Rivera, who's the bookkeeper of Two Rivers,
22 transferred herself out of Two Rivers' facilities in South
23 Plainfield, New Jersey, to an office in the Bronx where she
24 had been previously.

25 We turned over those boxes. Those boxes went back

1 in December, the same day that the passwords were provided.
2 They have all the books and records.

3 MR. SCHAFHAUSER: Your Honor, there's something else
4 that needs to be added. When Mr. Nelkin says no defendants
5 have produced documents, well, plaintiff served document
6 production requests on the defendants last week. So, pursuant
7 to Magistrate Judge Orenstein's merits discovery order, the
8 one that we're talking about here, document production
9 requests were to be served by March 2. Plaintiff served his
10 requests on March 2. We have 30 days to respond. So, to say
11 we haven't produced requests...

12 Plaintiff, by the way, has produced zero as well;
13 zero, despite the fact that plaintiff commenced this case and
14 on Page 2 of the complaint talks about many documents --

15 THE COURT: When did you make a document request of
16 plaintiff?

17 MR. SCHAFHAUSER: Excuse me?

18 THE COURT: When did you make a document request of
19 plaintiff?

20 MR. SCHAFHAUSER: Right about the same time.

21 THE COURT: So, he hasn't had opportunity to respond
22 yet either.

23 MR. SCHAFHAUSER: Correct. In fairness, I think we
24 did ours two days before he did his.

25 THE COURT: And you're not objecting to responding

1 to their documents request.

2 MR. NELKIN: I'm not. It seems they won't --

3 THE COURT: Here's what we're going to do --

4 MR. FELDMAN: Your Honor, I'm sorry, can I just be
5 heard on one thing?

6 THE COURT: Sure.

7 MR. FELDMAN: Mr. Nelkin says he wants every
8 document. My client is accountant for some of the defendants.
9 So, he's asked for all the financial records of all these
10 other defendants; clearly having nothing to do with
11 arbitrability, clearly having nothing to do but with merits
12 discovery.

13 In this case, it's my experience with these sort of
14 discovery proceedings in terms of arbitrability is what's the
15 intention of the parties with reference to that clause if it's
16 a close call?

17 If it doesn't have the broad language, what claims
18 should be brought under that?

19 And I understand, there's a nuance here in terms of
20 the confirmation of the award and whether or not there's
21 propriety in that and whether or not there's grounds for
22 overturning that subsequent order. I understand that. But in
23 terms of merit -- in terms of discovery other than that, the
24 plaintiff should be limited to the complaint.

25 He's alleged this enterprise, this conspiracy, this

1 intertwining. He's gone through page after page of the
2 interrelationship. There's no discovery necessary on that.
3 He already has alleged everything. It's really what's the
4 intention of the parties with reference to that clause and the
5 Maysharim and any communications with the Maysharim. That
6 should be the limit and not -- by saying any document related
7 to Two Rivers doesn't get free and unbridled access to all the
8 financial records of whatever these other companies and other
9 co-defendants have, either through Mr. Devine or through
10 themselves.

11 That seems to be overbroad and certainly beyond the
12 scope of the arbitrability issue.

13 MR. SCHAFHAUSER: Your Honor, there's one other
14 aspect that Mr. Nelkin had raised about the deposition of
15 Mr. Friedman. Mr. Friedman is the only one here with the
16 plaintiff who's subject to a written agreement. So, he's the
17 one who has the least to be deposed -- as to the issue of
18 arbitrability, as to the issue of arbitrability, I submit that
19 there's no need for a deposition of the person who actually
20 signed an agreement that was subject of this lawsuit.

21 MR. HELLER: Your Honor, can I be heard on this as
22 well? It will be quick.

23 The clause that Mr. Nelkin is referring to, clause
24 number five, paragraph five in the order, those -- in addition
25 to all the other eight paragraphs, those relate to the ability

1 of Two Rivers to do business. That is what they came here --
2 they claimed they couldn't do business because Mr. Friedman
3 was interfering with their ability to do business. That's
4 what this was here to address. This was not intended to be
5 the eye through which he's going to drag the camel of federal
6 discovery through. That's not what all this is about.

7 My clients have documents pertaining to Two Rivers.
8 Yeah, they did business with Two Rivers; therefore, they have
9 accounting entries, they may have e-mails that reference Two
10 Rivers. But that has nothing to do with Two Rivers' ability
11 to do business. That's not what this clause is all about.

12 To the extent they don't have documents that they
13 need to do their business, they should get them. Undoubtedly,
14 Mr. Papa knows what he needs. Let him request it. But
15 there's nothing in this clause that says -- that gives them
16 license to do Rule 26 discovery based on paragraph five.
17 That's not what this is all about.

18 MR. NELKIN: Your Honor, we think the clause speaks
19 for itself.

20 THE COURT: Why don't you just tell me now this
21 limited discovery you need to proceed at this juncture?

22 You want a deposition of Mr. Friedman. On
23 everything?

24 MR. NELKIN: We want a deposition. They're all
25 alleging that they're intertwined. They claim we made it up.

1 But if you look at Document 100 on Page 2, you'll see that's
2 the basis for the E & J defendants' motion to compel
3 arbitration, and you'll see the word "intertwined" I believe
4 appears in a number of the other --

5 THE COURT: What do you want discovery of
6 Mr. Friedman to do?

7 MR. NELKIN: We want discovery of Mr. Friedman to
8 explore the contact -- to explore the whole Beth Din process;
9 his refusal, everything else with regard to that, all of his
10 contacts with respect to any Beth Din as well.

11 We also would like to explore his connections with
12 the other people. They're alleging that they're all
13 intertwined. We would agree that it would be better and more
14 important for us to do depositions of each of the parties to
15 explore exactly how they're intertwined, and that may, in
16 fact, be something that is necessary.

17 We also want the grant --

18 THE COURT: I thought you said at this point in time
19 in terms of trying to narrow discovery that you would be
20 satisfied with the deposition of Mr. Friedman.

21 MR. NELKIN: I think that we would certainly like
22 the deposition of Mr. Friedman. I believe that a 30(b)(6)
23 deposition with respect to the different defendants, it could
24 be combined into one thing, but to explore their respective
25 roles vis-a-vis Mr. Friedman both from Mr. Friedman's

1 perspective and from their perspective would be --

2 THE COURT: Meaning you now want to depose all the
3 principals?

4 MR. NELKIN: What I'm saying is we would like to
5 understand exactly what they're claiming their relationship is
6 with Mr. Friedman.

7 THE COURT: How would you get that other than a
8 deposition?

9 MR. NELKIN: We could try for interrogatories, we
10 could try for requests for admission, but it would require
11 them to be forthcoming in those as opposed to, you know, using
12 all sorts of --

13 THE COURT: But for briefing this motion on
14 arbitration, what is the essence of what you need to brief the
15 motion on arbitration?

16 MR. NELKIN: I believe that if we were to get the
17 discovery the way we read the clause, that they have to
18 provide all the records pertaining to Two Rivers, then we can
19 see exactly how they interacted with Two Rivers and every role
20 that they played with Two Rivers. So, I think that getting
21 those documents --

22 THE COURT: You're talking about each separate
23 defendant giving you all of their records of their
24 relationship with Two Rivers.

25 MR. NELKIN: Correct.

1 THE COURT: So, each separate defendant giving you
2 documents.

3 MR. NELKIN: Yes. That's how we read the order.
4 The order was all defendants joining in on that by consent,
5 and it says, if you look at the page before -- the paragraph
6 on Page 2: The defendants and their representatives, whether
7 directly or indirectly, through any entity, corporation,
8 affiliate, executive director, director, manager, member --

9 THE COURT: And why is it that you need this right
10 away and that this can't await a decision on the arbitration
11 issue?

12 MR. NELKIN: First off, we think that we're entitled
13 to it just under the terms of the injunction, that that's
14 what -- we were supposed to have full discovery, it was
15 expedited discovery, they wanted to stop it, and, as a result,
16 we were given this, which we felt would give us most of the
17 documents that we needed to defend against any of the motions
18 that they're talking about. And they agreed to it without
19 qualification or reservation.

20 To the extent that they're now trying to cut back on
21 it and say that it means some very narrow thing, then we feel
22 that we were denied our right to do what we were getting ready
23 to do. They agreed to it on the eve of depositions for all of
24 the different parties. There were depositions scheduled,
25 there were 30(b)(6) depositions scheduled, and then they came

1 and said: We'll agree to all this without reservation.

2 And, so, when we saw that, we said: Fine. That
3 will give us most of what we need.

4 Now we've asked them repeatedly, we've conferred
5 with them, we've met with them, we said give us a time to come
6 and inspect these documents, and they say: You're not
7 entitled to them. Get them under discovery.

8 THE COURT: Who have you asked to come and inspect
9 the documents?

10 MR. NELKIN: We've asked each of the defendants and
11 we conferred after the last hearing in this courtroom and said
12 we want to be able to go but we've had a number --

13 THE COURT: Go to the premises and look through the
14 books and records, that's what you want to do, according to
15 this?

16 MR. NELKIN: Or they can produce them at some other
17 location. We're happy to do it, but, basically, we weren't
18 trying to go beyond the wording of the provision, but we're
19 prepared to discuss things that are more convenient for the
20 parties and we don't have any objection to any sort of
21 reasonable -- I mean, we would prefer, in fact, if they were
22 to gather it up and make it available.

23 Your Honor, just one thing with respect to the books
24 and records. I refer your Honor to Document 145, I think dash
25 4. It's Page 3. That's the letter I referred to where

1 Mr. Papa is saying he doesn't have --

2 THE COURT: Sorry, where are you?

3 MR. NELKIN: Docket No. 145-4.

4 THE COURT: Where is that?

5 MR. NELKIN: It's something that Mr. Schafhauser
6 just filed, but one of the attachments is a letter to
7 Mr. Schafhauser from Mr. Papa saying that the missing books
8 and records are too numerous to list and asking for a number
9 of documents.

10 My point is just they haven't produced --

11 THE COURT: Have you separately in a discovery
12 request requested the same thing, in a written discovery
13 request?

14 Have you already made that discovery request?

15 MR. NELKIN: We have.

16 THE COURT: In the format of, for instance, what's
17 in paragraph five, you have made that in the form of a
18 discovery request?

19 MR. NELKIN: I believe so.

20 But we would point out, your Honor, that we think
21 that the order doesn't have any qualifications or objections,
22 which we expect the discovery requests --

23 THE COURT: So, you think the order entitles you to
24 do what, go in there tomorrow and ask to see all the stuff?

25 MR. NELKIN: We think that they should make

1 available to us the books and records and all the other things
2 that are specified.

3 THE COURT: And how do you want them to make that
4 available to you?

5 MR. NELKIN: I'm assuming in the ordinary course of
6 business. We're not asking them to prepare it in any fashion
7 for us.

8 THE COURT: And you want a deposition of
9 Mr. Friedman.

10 MR. NELKIN: Yes.

11 THE COURT: And with that information, you can
12 respond to the arbitration motion, correct?

13 MR. NELKIN: I believe so, your Honor.

14 THE COURT: Okay. Then that discovery will go
15 forward.

16 MR. SCHAFHAUSER: Your Honor, may I just be heard?

17 THE COURT: No, I've heard enough.

18 Let me set the motions. We'll brief the arbitration
19 motion first. All the parties want to do that, everybody is
20 onboard about that. I had thought earlier that it might make
21 sense to get it all done at one time, but since everybody's on
22 the same page about that, I understand how that can cut down
23 on expense.

24 Can the motions be filed -- let's see, motions
25 should be filed by April 6 --

1 MR. SCHAFHAUSER: Your Honor, we're happy to file
2 them much sooner if your Honor wishes. Again, I'm happy to
3 abide by whatever schedule --

4 THE COURT: Motions to be filed April 6, oppositions
5 is May 6, any replies May 20, and oral argument will be on
6 June 10 at 2 o'clock.

7 Is that right, Alex?

8 THE CLERK: That's fine.

9 MR. GRANTZ: Would you repeat the days?

10 THE COURT: April 6, May 6, May 20, and June 10 at
11 2 p.m.

12 MR. GRANTZ: Thank you.

13 THE COURT: That's it.

14 MR. GRANTZ: Your Honor, before you go off, I have a
15 clerical question.

16 You said that Judge Orenstein was going to deal with
17 the issue of the --

18 THE COURT: The rent issue, yes.

19 MR. GRANTZ: That issue was presented by a letter to
20 your Honor. Should we recharacterize it to a letter to Judge
21 Orenstein?

22 THE COURT: No, you don't have to recharacterize it,
23 I'll just refer it to him. You haven't responded to it yet.
24 It came in yesterday, I guess.

25 MR. GRANTZ: It came in on Friday, your Honor.

1 THE COURT: Friday.

2 When are you going to respond to that?

3 MR. NELKIN: It would be helpful for us if we could
4 respond the following Monday, a week from this past Monday.

5 MR. GRANTZ: Remember, there's concerns about there
6 being a pivotal summary to dispossess.

7 THE COURT: Who's filed the summary to dispossess?

8 We don't need everybody to speak at ones.

9 Did the landlord file a summary to dispossess?

10 Who is the landlord, Friedman?

11 MR. GRANTZ: No.

12 THE COURT: Who's the landlord?

13 MR. SCHAFHAUSER: The landlord is, I believe,
14 Kentile Industrial, LLC. We reference -- the landlord is not
15 affiliated with -- it's a separate party.

16 THE COURT: Okay.

17 MR. SCHAFHAUSER: The landlord's counsel I believe
18 indicated that he had been directed to file, and we're trying
19 to find out whether it has, in fact, been filed.

20 THE COURT: It hasn't been filed yet, correct?

21 MR. SCHAFHAUSER: I don't know.

22 THE COURT: And you filed your papers on Friday,
23 last Friday?

24 MR. SCHAFHAUSER: I did.

25 THE COURT: Can you respond to it this Friday?

1 MR. NELKIN: Yes, your Honor.

2 THE COURT: I'll refer that application to Judge
3 Orenstein so it's clear it's before him.

4 MR. SCHAFHAUSER: Just so I understand, merits
5 discovery is held in abeyance pending --

6 THE COURT: No. I said he can go forward with the
7 document discovery as it's defined in the order and he can
8 have the deposition of Mr. Friedman.

9 And the deposition, I take it, will deal with the
10 interrelationship between the companies and the questions of
11 arbitrability. That's what you need, correct?

12 MR. NELKIN: The interrelation of the companies and
13 the arbitrability, but the interrelation is what role he
14 performed at the companies --

15 THE COURT: I'll allow discovery on that.

16 You had to show that the judge's order was clearly
17 erroneous. I don't think that that showing has been made
18 under all the circumstances. I understand the parties'
19 concerns about the breadth of discovery.

20 I think there are serious questions about
21 arbitrability here that have been raised, and I think that
22 plaintiff is entitled to go forward with the document
23 discovery. And I'll permit the one deposition.

24 We have a scheduled arbitration that has somewhat
25 alleviated the breadth of discovery here that was ordered by

1 Judge Orenstein. So, I think I've done my best to narrow it
2 to get to the central issues, but my view is that plaintiff is
3 entitled to that document discovery, they're entitled to a
4 deposition of Friedman, they can ask Friedman about the
5 interrelationship of the companies, they can ask him all the
6 questions about arbitrability. They're entitled to document
7 discovery on the question of arbitrability.

8 MR. SCHAFHAUSER: Your Honor, just so I can
9 understand --

10 THE COURT: I'm sorry you don't understand, counsel.
11 Is there something that I've said that's not plain? Because
12 you continually seem to have problems with what I'm saying,
13 and I apologize if I haven't been plain.

14 What now is the problem?

15 MR. SCHAFHAUSER: Your Honor talks about document
16 discovery that he may do.

17 THE COURT: That he has done.

18 MR. SCHAFHAUSER: It's pursuant to his request, and
19 does he then --

20 THE COURT: He would have to answer your document
21 discovery as well.

22 MR. SCHAFHAUSER: Thank you.

23 THE COURT: The two outstanding document discoveries
24 have to be responded to.

25 MR. SCHAFHAUSER: Thank you. That's what I wanted

1 to know.

2 MR. NELKIN: Thank you.

3 THE COURT: Okay.

4
5 (Matter concluded.)

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8 * * * * *

9
10
11
12 I certify that the foregoing is a correct transcript from the
13 record of proceedings in the above-entitled matter.

14
15 /s/ Linda A. Marino

March 10, 2016

16 _____
LINDA A. MARINO

DATE